No. 12198

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT

STATE OF CALIFORNIA, Department of Employment,

Appellant,

v.

FRED S. RENAULD & CO., Debtor, and GEORGE GARDNER, Receiver of the Estate of FRED S. RENAULD & CO., Debtor,

Appellees.

BRIEF FOR APPELLANT

Appeal From the United States District Court for the Southern District of California Central Division

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BRIEF FOR APPELLANT

STATEMENT OF CASE AND JURISDICTION

The within case arises on an agreed statement on appeal pursuant to Rule 76, F. R. C. P.

This is a proceeding under Chapter XI of the Bankruptcy Act. An order confirming the debtor's plan of arrangement has been duly entered. The State of California through its Department of Employment filed its claim in the amount of $1,503.98 interest, for taxes arising under the Unemployment Insurance Act.

Objections to the claim were jointly filed by the debtor and receiver and, after hearing, the referee allowed the claim except for the amount of $454.99.

The amount disallowed represents the tax claimed as due from the debtor based upon wages paid by it to certain employees after its incorporation on July 1, 1946. These employees had (prior to incorporation) been employees of a partnership consisting of Fred S. and Naomi Renauld, and the partnership had, during the year 1946, paid tax on the first $3,000 in wages paid to each employee.

Upon incorporation, the debtor considered that no further tax need be paid upon wages to employees who had during the partnership operations (and during the calendar year) received $3,000. The tax claimant, State of California, assessed the tax upon the theory and contention that upon incorporation the debtor became a new employer and was required to pay tax measured by the first $3,000 paid to any of its employees regardless of tax paid on any amount paid by the predecessor partnership to the same employees.

The referee ruled that in the calendar year 1946, the partnership and the corporation were one "employer" under the California Unemployment Insurance Act and that the corporation was not required to start anew the $3,000 limitation upon incorporation on July 1, 1946.

Upon petition for review of the order of the referee, the Judge of the United States District Court affirmed

the order of the referee and adopted the findings of fact and the conclusions of law of the referee as those of the United States District Court.

STATEMENT OF FACTS

On July 1, 1946, the debtor corporation took over a business which was at the time operated by a partnership composed of Fred S. Renauld and his wife (Tr., pp. 3, 4). There was no change in the type of the business or the place of business after assumption thereof by the corporation and the actual management was conducted by the corporation through and by its sole stockholder Fred S. Renauld in the same manner as it had been conducted during the partnership operations (Tr., p. 4). The same employees, in general, performed services for the corporation as performed services for the partnership; and the taxes both before and after July 1, 1946, all relate to the calendar year 1946 (Tr., p. 4), the reserve account of the partnership with the appellant was transferred to the corporation and the rate of contribution or merit rating of the partnership was assigned to the corporation (Tr., p. 4). In the calendar year 1946, the employment of the persons who had worked for the partnership and who continued to work for the corporation was considered as one employment by the corporation (Tr., p. 4). The corporation had taken the position that when any one of its employees had been paid the sum of $3,000 as an employee of the business here involved in the calendar year 1946, either before or after the

corporation took over the business from the partnership, that then and in that event, the corporation was not liable for contributions under the California Unemployment Insurance Act on any further amounts paid to such employee in excess of such sum of $3,000 in said calendar year (Tr., p. 5). The appellant took the position that the corporation was liable for contributions under the statute on the whole of the first $3,000 paid by it to any one of its employees in the calendar year of 1946, and subsequent to the first day of July of such year, notwithstanding the fact that such employee had been paid the whole or part of such sum of $3,000 as an employee of the business involved in such calendar year and before the corporation took over the said business from the partnership on July 1, 1946 (Tr., p. 5). In the claim filed by the appellant in the debtor proceedings, there was included the sum of $454.99 which appellant asserts was owing by the corporation because of the fact that it had not paid contributions under the California Unemployment Insurance Act on the whole of the first $3,000 which it had paid to each of its employees after they became employees of the corporation on July 1, 1946 (Tr., p. 5).

SPECIFICATION OF ERRORS

Appellant contends:

1. That the judgment of the court below in affirming the order of the referee disallowing that portion of the claim which represents the tax assessed on the first $3,000 in wages paid by the corporation was erroneous

and improper under the statutes of the State of California.

2. That the conclusion of the court below that it was bound to follow an unreported decision of the superior court of the state and an unreported decision of the appellate department of the superior court was erroneous.

APPELLANT'S ARGUMENT

I

The judgment denying a portion of the claim is in error. The corporation became a new employing unit upon succeeding to the partnership and should have paid taxes on the first $3,000 of wages paid by it to any worker during the same calendar year.

In deciding the purely legal question involved, the court will be required to place a construction upon certain terms defined in the Unemployment Insurance Act (3 Deering's General Laws, Act 8780D). Accordingly, these terms and definitions will be set forth herein, in their pertinent parts.

The Unemployment Insurance Act establishes an excise tax on the right to employ.

Stewart Machine Co. v. *Davis,* 301 U. S. 548, 81 L. Ed. 1279;
Gillum v. *Johnson,* 7 Cal. (2) 744, 63 P. (2) 810.

The tax is measured by wages paid to persons performing services in employment covered by the statute (Section 37, Unemployment Insurance Act).

Not all amounts paid as wages, however, are taxable.

The statute itself excludes from the definition of the term "wages" remuneration in excess of $3,000 paid to any one worker by "an employer" in any calendar year.

> "Sec. 11. (a) except as hereinafter in this section provided the term "wages" means:
>
> (1) All remuneration payable for personal services, * * *."
>
> "(c) If, when, and during such time as the definition of the term 'wages' as contained in the Federal Unemployment Tax Act excludes from 'wages' any one or more of the following types of payments, then such type or types of payments as are so excluded shall likewise be excluded from the definition of wages as contained in subsection (a) of this section:
>
> (1) That part of the remuneration which, after remuneration equal to three thousand dollars ($3,000) has been paid to an individual by an employer with respect to employment during any calendar year is paid after December 31, 1939, and prior to January 1, 1947, to such individual by such employer with respect to employment during such calendar year; or that part of the remuneration which, after remuneration equal to three thousand dollars ($3,000) with respect to employment after 1938, has been paid to an individual by an employer during any calendar year after 1946, is paid to such individual by such employer during such calendar year;".

The federal exemption from taxation upon wages in excess of $3,000 is contained in Section 1607(b) of the Federal Unemployment Tax Act (Internal Reve-

nue Code 1607(b)(1)), and is reflected in Treasury Regulations Section 403.227 relating to "wages."

The $3,000 limitation on what constitutes wages as above noted, however, is a limitation which may be taken advantage of only by "an employer." Nothing is said in the statute which would sanction use of the limitation by the successor of an employer in the manner here sought. The limitation was utilized by the partnership and properly so. The propriety of its attempted use by the corporation (based upon wages paid by the partnership) is neither apparent from the statute, wherein it defines the terms "employer" "employing unit," nor from general principles of law which clearly distinguish between a partnership and a corporation as a legal entity.

Section 9 of the statute defines the term "employer" in part as follows:

Section 9 "Employer" means:

> "(b) Any individual or employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another which at the time of such acquisition was an employer subject to this act."
>
> "(c) 'Employing unit', as used in this act, means any individual or type of organization, including any partnership, * * * or corporation whether domestic or foreign * * *."

Lest any doubt exist as to the intention of the Legislature to differentiate clearly between a partnership and a corporation as an employing unit, the statute

in Section 8.5 thereof separately defines "employing unit" in pertinent part:

> "Sec. 8.5. 'Employing unit,' as used in this act, means any individual or type of organization, including any partnership, association, trust, estate, joint stock company, insurance company, corporation whether domestic or foreign, and the receiver, trustee in bankruptcy, trustee or successor thereof, and the legal representative of a deceased person, which has, or subsequent to January 1, 1936, had, in its employ one or more individuals performing services for it within this State * * *."

No contention can successfully be made in this matter that there is no difference in law between a partnership and a corporation. The one is an association of two or more persons to carry on a business, the other is an artificial person created by law. Each, however, may be an employer required to pay unemployment insurance taxes. Section 37 of the Unemployment Insurance Act provides:

> "(a) Employer contributions to the unemployment fund shall accrue and become payable by *every employer* for each calendar year in which he is subject to this act, with respect to wages paid for employment. Such contributions shall become due and be paid to the commission for the unemployment fund *by each employer* in accordance with this act and shall not be deducted in whole or in part, from the wages of individuals in his employ." (Emphasis supplied.)

The use of the words "every employer" and "each employer" in the above quoted section considered in

connection with the definition of "employer" and "employing unit" as heretofore set forth indicate a clear intention that each separate entity enumerated by the statute as an "employing unit" should be subject to making contributions as provided by law, which includes payment of taxes on the first $3,000 paid as wages to any one worker in the calendar year.

In addition to the already enumerated sections of the statute showing a clear differentiation between a partnership and a corporation as employing units under the Unemployment Insurance Act there is a regulation of the Department of Employment, which administers the statute, directly in point. Of this regulation the court is entitled to take judicial notice.

Anders v. *State Board of Equalization,* 82 Cal. App. (2) 88, 98, 185 P. (2) 883;
Allen v. *Industrial Accident Commission,* 3 Cal. (2) 214, 43 P. (2) 787;
Wood v. *Kennedy,* 117 Cal. App. 53, 60, 3 P. (2) 366.

The regulation referred to is Regulation 65, California Administrative Code, Title 22, which provides:

> "If remuneration paid for subject employment performed for an employer during any calendar year exceeds $3,000, the taxable wage shall not include that part of such remuneration which is in excess of the first $3,000 paid. *If the employee works for more than one employer* during the calendar year, *each of his employers shall include as wages the first $3,000 paid to such employee* with respect to subject employment during such calendar year * * *." (Emphasis supplied)

It is submitted that the interpretation placed upon the statute by the administrative agency charged by the Legislature with the duty of administering it is entitled to great weight, and that the court should not depart from such construction unless it is clearly erroneous or unauthorized.

Coca Cola Co. v. *State Board of Equalization,* 25 Cal. (2) 918, 156 P. (2) 1;
National Labor Relations Board v. *Hearst Publications,* 322 U. S. 111, 64 Sup. Ct. Rep. 851.

In the last cited case Mr. Justice Rutledge stated for the court:

> "* * * Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the statute. *Norwegian Nitrogen Products Co.* vs. *United States,* 288 U. S. 294; *United States* vs. *American Trucking Associations Inc.,* 310 U. S. 534. But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the Statute must determine it initially, the reviewing court's function is limited. * * *."

Appellant submits that the clear and proper interpretation of the statute requires that a corporation which succeeds to the business of a partnership be considered as a new employer required to pay taxes on wages paid to any one employee up to the amount of $3,000 in any calendar year, regardless of any amounts paid by a predecessor.

The corporate form of existence obviously was chosen by the debtor to avoid certain liabilities attaching to continued operation as a partnership. In accepting the advantages of this form of business entity the debtor should likewise be required to accept its disadvantages. In equity the business should not be permitted to shed its characteristics and liabilities as a partnership and at the same time cling on to advantages properly enjoyed by the partnership in order to avoid a tax liability. This is especially true in the absence of express statutory authority so to do, which authority does not exist in this case.

It is further submitted that were the Legislature, in its wisdom, to have intended that a successor employer should enjoy the benefits of amounts paid to workers by the predecessor, with regard to the $3,000 limitation on taxable wages, it would have said so. The very omission of language rendering non taxable such wages and failing to provide that wages of the predecessor might be "tacked on" to wages paid by the successor employer is a significant guide to the construction of the statute which lends weight to the fact that not only was such "tacking on" not provided for, but, in fact, was not intended.

To hold that a successor corporate employer and a predecessor partnership employer constituted but "one employer" under a tax statute and thus relieve the corporation of a tax liability is to ignore the clear terms of the statute which, far from exempting successor employing units, expressly declares that "each

employer'' and ''every employer'' shall pay the tax on wages paid by it as defined by statute (i.e. up to the first $3,000 in wages paid to any worker).

Appellant is not unmindful that the court below was impressed by the identity of actual ownership, the identity of the workers involved, the identity of actual management and the identity of the business transacted after incorporation with those factors as they existed during the partnership operations, in issuing judgment denying a part of the appellant's claim. The appellant is not so impressed and respectfully submits that this court should not be so impressed.

The factors mentioned are not without importance with reference to the question of whether the predecessor's reserve account should be transferred to the successor. The statute enumerates many of these factors (Unemployment Insurance Act, Section 41.5) as grounds for transfer of the reserve account which transfer was made in this case. The statute provides that when these factors exist, the successor employer may have the benefit of the merit rating or lowered rate of contribution held by the predecessor (ibid.) and this was accomplished in this case.

Nothing, however, is said in the statute about these factors constituting grounds for considering a new employing unit and its predecessor as ''one employer'' for purposes of the $3,000 limitation on wages subject to the tax. The very silence of the statute in this regard bespeaks, most eloquently, the intention that

these factors not be considered for the purpose involved.

Further cogent evidence of the legislative intent to tax each new employer on the first $3,000 of wages paid by it, regardless of amounts paid by a predecessor to its workers, is found in Section 44.2(b) of the statute which provides for refunds to workers when employee contributions have been made on amounts in excess of $3,000 paid to them by more than one employer.

> "Section 44.2(b). If by reason of a worker rendering service for more than one employer during any calendar year after the calendar year 1943, the wages of the worker with respect to employment during such year exceed three thousand dollars ($3,000), the worker shall be entitled to a refund of any amount of tax, with respect to such wages, imposed by section 44, deducted from such wages and paid to the commission, which exceeds the tax with respect to the first three thousand dollars ($3,000) of such wages received * * *."

No such provision for refund is made to "an employer" or to "every employer" who, on the contrary is expressly required to pay tax on all wages paid by it up to the amount of the limitation on taxability thereof.

The appellant submits:

(1) That the corporation was a new "employing unit" and a new and different "employer" as defined by statute and that the preexisting partnership cannot

be considered, together with the corporation, to constitute but one "employer" as found by the court below.

(2) That the statute (which enumerates "each employer" and "every employer") intends that each new entity which succeeds to a business shall pay tax as required on all wages up to the limit on taxability.

(3) That the partnership was dissolved and dead, thus possessing no capacity to assist the corporation which succeeded to it, in the manner here claimed.

(4) That the incidental factors to the change in employing unit, such as control of management, ownership and identity of workers before and after the acquisition is totally irrelevant and unimportant so far as the $3,000 limit on taxable wages is concerned.

(5) That nowhere in the statute can language be found which would justify the "tacking on" of wages paid by a predecessor in order to avoid a tax liability assessed against the successor.

The appellant concludes and submits that the judgment of the court below denying that part of the tax claim which relates to wages paid by the corporation but which the debtor considered exempt under the $3,000 limitation, is in error and should be modified by the allowance of the claim in full and as filed by the tax claimant.

II

The question raised by this point concerns the extent to which, if at all, a decision of the superior court

and a decision of the appellate department of the superior court constitute the rule of decision in federal court under the Federal Rules of Decision Act (Judiciary Act of 1789, Section 34, Rev. Stat. Section 721, 28 U. S. C. A. Section 725) and Section 1, Article IV of the United States Constitution.

The significance of this question is derived from the existence of a single decision from each such forum on the issue before this court.

> *California Employment Commission* v. *Ransohoff's Inc.* (Mun. Ct., S. F., No. 169784, Appellate Department of Superior Court No. 1618, (1944));
>
> *J. F. Barrett and Harry H. Hilp* v. *California Employment Commission* (Superior Court, S. F., No. 341890, (1945)).

These two decisions constitute the only judicial expression on the question to be found in California law. It is the position of the appellant that their capacity to bind federal courts as precedent is completely negative for the following reasons:

1. Neither case constitutes binding precedent, even in California.

2. Neither settles the law on the subject, even in California.

3. Each erroneously decides the law.

4. They are decisions of a court of first instance, are the only state decisions on the subject and their existence can be determined only by an examination of court records.

A. This Court Is Not Bound to Follow the Barrett and Hilp Case (Supra) in Deciding the Question at Bar

The cited case was one brought against your appellant in a forum selected by the plaintiff Barrett and Hilp. It involved the question of whether a new entity resulted when a limited partnership succeeded the general partnership of Barrett and Hilp so far as the $3,000 limitation on amounts considered as "wages" is concerned. The Superior Court of the State of California in and for the County of San Francisco decided no new entity was created. No written opinion deciding the cause exists. No appeal was taken from the judgment.

Preliminarily, the case fails to constitute compelling authority by reason of fundamentally different facts. In the *Barrett and Hilp* case, one partnership was succeeded by another. In the case at bar, the partnership form was entirely abandoned in favor of corporate existence. Secondly, the case fails to constitute compelling authority under the ruling of the United States Supreme Court in *King* v. *United Commercial Travelers,* 333 U. S. 153, 92 L. Ed. 609 (1948), 68 S. Ct. 488.

The Supreme Court in that case held that a federal court sitting in South Carolina need not follow a court of common pleas decision of that jurisdiction where it did not appear that the decisions of such court were authoritative expositions of that state's "law." The court noted that (as in the *Barrett and Hilp* matter) in future matters between different parties a

common pleas decision does not exact conformity from either the same court or lesser courts and may be ignored by other courts in common pleas without compunction. Of particular significance is the court statement:

> "Secondly, the difficulty of locating Common Pleas decisions is a matter of great practical significance. Litigants could find all the decisions on any given subject only by laboriously searching the judgment rolls in all of South Carolina's forty-six counties. To hold that federal courts must abide by Common Pleas decisions might well put a premium on the financial ability required for exhaustive screening of the judgment rolls or for the maintenance of private records. In cases where the parties could not afford such practices, the result would often be to make their rights dependent on chance; for every decision cited by counsel there might be a dozen adverse decisions outstanding but undiscovered.
>
> "In affirming the decision below, we are deciding only that the Circuit Court of Appeals did not have to follow the decision of the Court of Common Pleas for Spartanburg County. We do not purport to determine the correctness of its ruling on the merits. Nor is our decision to be taken as promulgating a general rule that federal courts need never abide by determinations of state law by state trial courts. As indicated by the Fidelity Union Trust Co. Case, other situations in other states may well call for a different result."

The *Barrett and Hilp* decision represents but a single opinion of a trial court of the state forum. It

does not even attain to the dignity of a written decision. It is totally unreported. It concludes only the parties to the action in which judgment was rendered.

Appellant submits, accordingly, that it falls directly within the rationale of the *King* v. *United Commercial Travelers* decision (supra) and thus cannot be considered as compelling authority in the case at bar.

B. The Decision of the Appellate Department of the Superior Court in the Ransohoff Case (Supra) Is Not Binding on the Courts of the United States in the Matter at Bar

The *Ransohoff* action was filed by your appellant against the defendant Ransohoff corporation in the Municipal Court in San Francisco and resulted in judgment for the plaintiff which was appealed to the appellate department of the superior court. The facts of the *Ransohoff* case are virtually identical with those in the matter before this court and, as here, involved the question of whether a new entity came into being when a corporation succeeded to a partnership. A memorandum opinion deciding the cause was prepared but has not been included in any of the reports. No further avenue of appeal was open to your appellant.

It may be conceded that the appellate department of the superior court is a court of final jurisdiction on appeal from the judgment of the municipal court.

> *Nelson* v. *Darling,* 103 Cal. App. 523, 284 P. 1095; *Johnston* v. *Wolf,* 208 Cal. 286, 280 P. 980.

It is submitted, however, that the effect of the finality of such a judgment is to be found more in the

fact that the judgment of the appellate department of the superior court renders its decision a matter "res adjudicata" rather than a decision to be accorded consideration under the doctrine of "stare decisis."

Research has disclosed but one decision concerning the effect to be accorded a decision of the appellate department of the superior court. In the case *In Re Wiegand,* 27 F. Supp. p. 725, the Judge of the District Court, S. D. California, Central Division (1939) stated:

> "In fact, the appellate department is known at the Bar as 'the little supreme court', as to matters within its jurisdiction. Unless its decisions, therefore, should conflict with the district courts of appeal or with the Supreme Court of California, they are binding on all."

The holding of the district court which followed the opinion of the appellate department of the superior court was subsequently reversed by the circuit court of appeals, for the 9th circuit in *Bank of America* v. *Sampsell,* No. 9472 (1940), 114 F. (2) 211.

Despite the appellation generously accorded the Appellate Department of the Superior Court as being the "little supreme court," it is respectfully submitted that the opinions of this court are not binding upon the District Courts of Appeal, the Supreme Court or, indeed, upon the Superior Courts or Appellate Department thereof in any county outside of the one in which the opinion was rendered. In addition, these opinions are not required by law to be reported, those

which are reported reach that state solely at the whim of the department issuing the decision.

The *Ransohoff* decision was not among those so dignified. It is an unreported decision and your appellant submits that this fact renders it subject to the same objection which was made in *King* v. *United Commercial Travelers* (supra).

The *Ransohoff* decision represents the only decision in California that may lay claim to any vestige of appellate dignity, however slight that vestige may be. Being the only decision on the point by the forum involved, it cannot be said to constitute a "rule of decision" even in California.

Any efficacy which the decision might be said to possess is further diminished by reason of the fact that it is a decision reversing a municipal court judgment which was issued at a time when the jurisdiction of the municipal court in such tax matters was being questioned on appeal in another case. The date of the opinion by the appellate department of the superior court was March 10, 1944. On February 7, 1944, the District Court of Appeal of the State of California decided that in cases in which the defendant denied he was an employer under the Unemployment Insurance Act that the question of the legality of the tax was put in issue. Over this question the municipal court has no jurisdiction.

California Employment Stabilization Commission v. *Municipal Court of the City and County of San Francisco,* 62 Cal. App. (2) 781, 145 P. (2) 361.

Although the district court decision preceded the *Ransohoff* decision by one month, the *Ransohoff* case had been tried in the municipal court over a year prior to its issuance (December 15, 1942), and the appeal in the *Ransohoff* matter was submitted to the appellate department of the superior court one month prior to the issuance of the district court decision (January 14, 1944). Motion to vacate the judgment on grounds of lack of jurisdiction was denied on May 5, 1944. While the pleadings in the *Ransohoff* action do not contain a formal express denial of the allegations that the corporation was an employer subject to the contributory provisions of the Unemployment Insurance Act, the case, so far as the $3,000 limitation on wages is concerned, was tried on that theory.

The tax claimant in the case at bar has never considered itself bound by the *Ransohoff* decision in view of the later expression by the District Court of Appeal of the State of California.

The appellate department of the superior court could have acquired jurisdiction in the *Ransohoff* case only to the extent that the municipal court possessed jurisdiction.

Unemployment Reserves Commission v. *St. Francis Homes Assn.*, 58 C. A. (2) 271, 137 P. (2) 64.

While some doubt might exist as to whether the municipal court acted without jurisdiction in view of the later district court decision in *California Employment Stabilization Commission* v. *Municipal Court* (supra), the very existence of this doubt renders the appellate

department decision by the superior court of but scant, if any, compulsion as precedent in federal court.

The efficacy of the decision is further vitiated by its singularity. As was stated by Gibson, District Judge, in *Neff* v. *Hindeman,* District Court, W. D., Pennsylvania (1948), 77 F. Supp. p. 4:

> "* * * It may be conceded that lower court cases may show the law of the state. Where a number of them unite on the same proposition, without contradiction by an appellate court for a long period, it may well be assumed that as the law of the state, it is generally accepted. But 'one swallow doesn't make a summer.' It just seems at least strange if federal judges, themselves sitting in the same state, are required to accept as the law of the state a single decision of a lower court even though their own judgment may be counter to it. * * *"

The Circuit Court of Appeals for the Ninth Circuit has held in a proceeding for reorganization of a corporation that it is not bound by superior court decisions.

In *Woods, et al.* v. *Deck* (C. C. A. (9) No. 9336),[12] June 7, 1940, where the rights of certain petitioners were predicated upon a decision of the California Superior Court this court stated:

> "It remains to consider the claims of the original petitioners. Since their claims and those upon which the judgment was based in the case of McFaul v. Deck, supra, involve the same questions, it is clear that if we follow the decision in that case we must hold that they also are creditors of the

alleged bankrupt. *This decision, however, is not binding upon us as an authoritative decision upon the law of California, since it is not a decision of the highest court of the state.* Nevertheless it is in strict accordance with the decisions of that court. (Emphasis supplied.)

The Circuit Court of Appeals for the Eighth Circuit has followed the same view. In *Summers* v. *Travelers Insurance Co.,* 109 F. (2) 845 (C. A. A. 8, 1940), the court stated:

> "The Supreme Court of Missouri has had no occasion to construe the cancellation clause of a policy similar to the clause here involved, and no decision of that court is cited in appellant's brief in support of his contention that a return of the unearned premium was a condition precedent to the right of cancellation. Certain decisions of the intermediate appellate courts of Missouri are cited, which it is contended support this view. *We do not find it necessary to consider whether they lend support to appellant's contention or not because we are bound by the decisions of the higher court of the state and not by the decision of the intermediate courts. Hudson, et al.,* vs. *Maryland Casualty Co.,* 8 Cir., 22 F. 2d 791; *Federal Lead Co.* vs. *Swyers,* 8 Cir., 161 F. 687; *Turner* vs. *New York Life Insurance Co.,* 8 Cir., 100 F. 2d 193." (Emphasis supplied.)

In another case arising in the Eighth Circuit, the court in *Anglo American Land Co.* v. *Lombard,* 132 F. 721, 741, 742, stated:

> "A fixed and settled rule of decision in a state court of last resort establishes the law of the state in such manner as to bind the federal courts in all matters controlled by the state law; but the opinions of intermediate appellate courts, like the Kansas City Court of Appeals, while entitled to great respect and regarded as persuasive authority; are not controlling upon the federal courts, because they do not settle the law of the state."

The Circuit Court of Appeals for the Sixth Circuit adheres to the same view. In *United States Telephone Co.* v. *Central Union Telephone Co.,* 202 F. 66, 69, that court stated:

> "It is clear that the obligation to follow the lead of the state courts do not arise, unless the court to be followed is the court of last resort in the state * * * and particularly so when the lower court opinions are not unanimous or numerous or old enough to show a settled rule."

Cited to the same effect: *Irving National Bank* v. *Law,* 9 F. (2) 536, 537, Circuit Court of Appeals 2d Circuit.

The Circuit Court of Appeals for the Third Circuit in *Field* v. *Fidelity Union Trust Co.,* 108 F. (2) 521, has likewise held in an opinion, which exhaustively discusses the question of what effect is to be accorded a decision of a trial court, that it was not bound by two decisions of the Court of Chancery of New Jersey. Subsequently, however, this circuit court decision was reversed by the United States Supreme Court in *Fidelity Trust Co.* v. *Field,* 311 U. S. 169, 177 (1940),

where the court held that the decisions of the Court of Chancery of New Jersey were binding upon the circuit court. This ruling, however, goes no farther than to decide just that point.

In *King* v. *United Commercial Travelers* (supra) (1948), the United States Supreme Court stated:

> *"The Fidelity Union Trust Company case did not, however, lay down any general rule as to the respect to be accorded state trial court decisions.* This court took pains to point out that the status of the New Jersey Court of Chancery was not that of the usual nisi prius court. It had state-wide jurisdiction. Its standing on the equity side was comparable to that of New Jersey's intermediate appellate courts on the law side. A uniform ruling by the Court of Chancery over a course of years was seldom set aside by the state's highest court. And chancery decrees were ordinarily treated as binding in later cases in chancery." (Emphasis supplied.)

CONCLUSION

The appellant concludes that the judgment of the court below in affirming the order of the referee which disallowed that portion of the claim representing the tax assessed on the first $3,000 in wages paid by the corporation was erroneous and improper under the statutes of the State of California and that the conclusion of the court below that it was bound to follow the *Barrett and Hilp* and *Ransohoff* decisions (supra) of the intermediate state court was erroneous.

Appellant, accordingly, submits that the judgment should be reversed and the claim allowed as filed.

Respectfully submitted,

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